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## MYCOM BHD

v.

## LIN WEN CHIH & ANOR

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HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[ORIGINATING SUMMONS NO: D8-24-377-2007]
9 JANUARY 2008

C ***COMPANY LAW:*** *Winding up - Petition - Opposition to winding up - Application to restrain respondents from presenting petition to wind up - Allegation that respondents used irregular order of High Court - Whether proved - Whether affected validity of intended presentation to wind up - Whether applicant obliged to pay judgment sum - Whether open to* D *applicant to seek injunctive order to restrain respondents from presenting winding up petition - Companies Act 1965, s. 218(1)(e)*

This was an application by the applicant to restrain the respondents from presenting the petition to wind up the applicant E company on account of it being unable to pay its debt under s. 218 (1)(e) of the Companies Act 1965, a statutory notice having been effectively served on the applicant. The debt arose from a judgment obtained by order of the Court of Appeal on s29 March 2007 reversing the dismissal of the respondents' claim F at the High Court of Tawau. The applicant relied on the grounds that the s. 218 notice that was served on the applicant was premised on a High Court judgment dated 26 October 2007 which does not exist because the High Court had dismissed the respondents' claim on 29 July 2000 (the judgment at exh. NJ-2 of G encl. 2). The applicant therefore submitted that the notice served was wholly incorrect, null and invalid because the substance of the notice was a non-existent judgment. The respondents, however, contended that there was no serious question to be tried because the judgment of the High Court of Tawau dated 26 October 2007 H pursuant to the Court of Appeal decision on 29 March 2007 had been duly approved by both the applicant and respondents.

**Held (dismissing the application):**

**(1)** The fact that the respondents may have issued an irregular I order of the High Court in the statutory notice should not affect the validity of any intended presentation to wind up the applicant. A petition to wind up a company under s. 218(1)(e)

of the Act is a petition on account of the fact that the company is unable to pay its debt and the statutory notice only provides a rebuttable presumption that the company is unable to pay its debt if it fails to satisfy the demand for the alleged debt on the notice within 21 days. The petitioner would still be able to rely on other evidence with respect to the solvency of the company. (para 5)

**(2)** The respondents were entitled herein to rely on the Court of Appeal order to demand that the applicant paid its debt to the respondents. The applicant was obliged in law to pay the judgment sum as ordered by the Court of Appeal. A failure on its part to pay the judgment sum on demand raised the presumption that it was unable to pay its debt. It was not open to the applicant to seek an injunctive order under the circumstances to restrain the respondents from presenting a winding up petition. (para 6)

**Cases referred to:**
*Bryanston Finance Ltd v. de Vires (No 2) [1976] Ch 63* ***(refd)***

**Legislation referred to:**
Companies Act 1965, s. 218(1)(e)

*For the applicant - Prem Ramachandran (R Mohana Krishnan with him); M/s Kumar Partnership*
*For the respondent - TS Liew (Henry Lim with him); M/s TS Liew, Nurzila & Co*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Kang Hwee Gee J:**

**(Oral Judgment delivered immediately after submission.)**

**This is my oral judgment: (ex-tempore)**

**[1]** This is an application by the applicant to restrain the respondents from presenting the petition to wind up the applicant company on account of it being unable to pay its debt under s. 218(1)(e) of the Companies Act 1965, a statutory notice having been effectively served on the applicant.

**[2]** The debt arose from a judgment obtained by order of the Court of Appeal on 29 March 2007 reversing the dismissal of the respondents' claim at the High Court Tawau Sabah.

**[3]** The grounds relied upon by the applicant are as follows:

1. The 218 notice that was served on the applicant is premised on a High Court of Tawau judgment dated 26 October 2007 which does not exist because the High Court of Tawau dismissed the respondents' claim on 29 July 2000. The written ground of judgment of the High Court Tawau dismissing the respondents' claim is at exh. "NJ-1" of encl. 2. The correct judgment of the High Court of Tawau dated 29 July 2000 dismissing the respondents' claim is at exh. "NJ-2" of encl. 2. The respondents' 218 notice refers to a judgment dated 26 October 2007 of the High Court of Tawau which does not exist and is exhibited as exh. "NJ-6" of encl. 2. We therefore submit that the notice served on the applicant is wholly incorrect, null and invalid because the substance of the notice is a non existent judgment. The non existence judgment in exh. "NJ-7" of encl. 2 is being challenged.

2. The company is a commercially solvent company entity. The profit for the year 2007 is RM343 million. The total equity is RM826 million and the total asset of the company is RM1.26 billion. The audited account and company reports are produced as exh. "NJ-8" of encl. 2 and exh. "NJ-9" of encl. 12. The judgment debt is only in the region of RM13.5 million which is very much within the capacity of the applicant to settle. The applicant has not paid the 218 notice because the 218 notice is premised on the High Court judgment that does not exist and the applicant has also applied for a stay of execution in the Court of Appeal by an application filed on 1 November 2007 and fixed for hearing on 25 February 2008 and the applicant has also applied for leave to the Federal Court to appeal against the decision of the Court of Appeal which was filed on 24 April 2007. The application for leave has not yet been fixed for hearing.

**Reply by counsel for the respondents: (verbatim)**

1. There is no serious question to be tried because the judgment of the High Court of Tawau dated 26 October 2007 pursuant to the Court of Appeal decision on 29 March 2007 had been

duly approved by both the applicant and respondents. This is undisputed and therefore there is no serious question to be tried.

2. It is obvious that the applicant is turning a blind eye to the actual situation. They are aware of the Court of Appeal order ordering the applicant's judgment dated 29 July 2000 be set aside and further ordered that judgment be entered against the applicant. Therefore their contention that the Tawau High Court judgment dated 26 October 2007 is non existent is baseless.

3. The applicant's conduct in attending to a matter is slothful. After the Court of Appeal granted the order on 29 March 2007 giving judgment to the respondents the applicant sat on it for more than 7 months before they took action to file for leave to stay all proceedings arising from the Court of Appeal order at the Court of Appeal on 1 November 2007. This application is only filed in December 2007. The applicant's application is discretionary relief granted to cases of urgency. However in this case the applicant's conduct is slothful and would only respond to action taken by the respondents.

4. On the financial position of the applicant, the issue of how much assets the applicant has is irrelevant. It is a question of solvency. My learned friend submitted the profitability and assets on a Group level whereas at Company level it is submitted it is a different story. In terms of profitability I refer to p. 30 of the applicant's exh. "NJ-9" in encl. 12 where it is shown that in 2006 the applicant made a loss of RM27 million whereas in 2007 they made a profit of RM174,684,000, only because of a restructuring scheme and a waiver of interest of RM298,251,000 which is a one off thing and not a recurring profit (operational profit). The company Mycom Bhd standing alone is in fact insolvent.

5. Nevertheless if the applicant is as financially strong as claimed then the applicant should pay the judgment sum plus all the accrued interest to date into court as was done in the RHB Bank case.

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## Findings And Decision

**[4]** In order to obtain an injunction to restrain the respondents from presenting the petition under s. 218(1)(e) of the Companies Act 1965 it is incumbent upon the applicant to show that the
B petition if presented is bound to fail. See the test in *Bryanston Finance Ltd v. de Vires (No 2)* [1976] Ch 63 (refd).

**[5]** The fact that the respondents may have issued an irregular order of the High Court in the statutory notice should not affect the validity of any intended presentation to wind up the applicant.
C It is to be noted that a petition to wind up a company under s. 218(1)(e) of the act is a petition on account of the fact that the company is unable to pay its debt and the statutory notice only provides a rebuttable presumption that the company is unable
D to pay its debt if it fails to satisfy the demand for the alleged debt on the notice within 21 days. The petitioner would still be able to rely on other evidence with respect to the solvency of the company.

**[6]** The respondents are entitled in this case to rely on the
E Court of Appeal order to demand that the applicant pays its debt to the respondents. The applicant is obliged in law to pay the judgment sum as ordered by the Court of Appeal. A failure on its part to pay the judgment sum on demand raises the presumption that it is unable to pay its debt. It is not open to the applicant
F to seek an injunctive order under the circumstances to restrain the respondents from presenting a winding up petition if they so wish.

**[7]** The application is dismissed with costs.

G **[8]** Counsel for the applicant applies for an Erinford relief pending his intended appeal to the Court of Appeal on this decision. Court disallows on the ground that it would be most unfair to the respondents as it is clear that they had in their hands a valid judgment from the Court of Appeal whose fruits
H they should not be denied the immediate benefit of.

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